IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MCKENNA, Plaintiff	:	CIVIL ACTION
v.	:	NO. 98-5835
CITY OF PHILADELPHIA, SGT. JOHN MORONEY, LT. FRANK BACHMAYER, CAPT. WILLIAM COLARULO, LT CULLEN, LT. WILSON, INSPECTOR O'CONNOR, AND LT. DAVID HOGAN, Defendants	:	

MEMORANDUM AND ORDER

McLaughlin, J. January 16, 2003

Michael McKenna, a former Philadelphia police officer, alleges (1) that he was retaliated against by the Philadelphia Police Department and the individual defendants because he opposed discriminatory conduct by his supervisor, Sergeant Moroney, and (2) that his right to due process was violated during an investigation by the Ethics Accountability Department. The defendants have filed a motion for summary judgment; the Court will grant the motion.

The alleged discriminatory conduct by Sergeant Moroney

consisted of the use of racial slurs. Because the plaintiff is white and no African-American officer heard the racial slurs, the plaintiff cannot show that he engaged in protected conduct. Nor are the job conditions about which he complains adverse employment actions. In addition, to the extent that the plaintiff complains about conduct by his supervisors, the defendants have shown non-discriminatory, non-retaliatory reasons for their decisions that the plaintiff has not shown to be a pretext.

The right to privacy claim is also without merit. Mr. McKenna complains that his constitutional rights were violated when the Ethics Accountability Division notified him about a meeting via the teletype system that is accessible to all officers. Such conduct does not amount to a constitutional violation.

I. Background

A. Facts

Michael McKenna graduated from the Philadelphia Police Academy in 1996 and was assigned to be a community policing footbeat officer in the 7-squad of the 25th District, a high

crime area located in North Philadelphia[1]. Def. Ex. A, at 18, 30-31, 35-36, 49[2].

In August of 1997, Captain Colarulo became the commanding officer of the 25th District. Lieutenant Bachmayer started working in the District at approximately the same time. Captain Colarulo initiated saturation details in the high drug areas of the 25th District to try to shut down the drug dealers. As part of the saturation details, officers were required to stand at street barricades and prevent non-residents from driving their cars into the neighborhood. Def. Ex. A., at 38-40, 47-49.

Between August, when Colarulo and Bachmayer arrived,

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[1] In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

[2]Hereinafter, Exhibits to Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment will be labeled "Def. Ex." followed by the exhibit letter and page number. The Exhibits to Plaintiff's Response to Defendants' Motion for Summary Judgment will be labeled "Pl. Ex." followed by the exhibit letter and page number. References to the transcript from the November 1, 2002 oral argument on this motion are indicated as "Tr." followed by the transcript's page number.

and October of 1997, the 7-squad did not have a regular sergeant supervisor; instead various sergeants rotated supervision of the squad. There were several officers in the squad who took advantage of the lack of supervision and stayed inside while other officers were working the beat. In October of 1997, Sergeant Moroney became the squad's supervisor. Def. Ex. A, at 38-40, 42-45.

1. Sergeant Moroney's Conduct

Sometime in October of 1997, the plaintiff heard Moroney say "I'm going to get that nigger Safford." The plaintiff said, "Please do not use any words like that in my presence. I don't want people to think you are talking to me about something like that." The plaintiff was the only one in Moroney's presence at the time. Def. Ex. A, at 56-57.

The plaintiff's testimony reflects that several events occurred during the fall or winter of 1997. The plaintiff did not specify, however, in what order the following events occurred.

The plaintiff, while on duty, approached Myrna Moore, an African-American officer who was also in the 7-squad. Officer Moore was on duty, standing outside by herself in the rain. She told the plaintiff that she had been told to stand at that

location. The plaintiff told her that she was supposed to be working with the plaintiff and his partner, and that they were going to patrol the area in the car, not on foot. The plaintiff told Officer Moore that, if she was working with him, she should go with him and not stand on the corner by herself. Officer Moore agreed, and got in the back seat of the car. Def. Ex. A, at 63.

Sergeant Moroney arrived at the plaintiff's location and waved the plaintiff over to Sergeant Moroney's truck. The plaintiff walked over and Sergeant Moroney said, "What's the nigger doing in the car?" The plaintiff responded, "Sarge, I told you once before about this. Don't use that in front of me again." Def. Ex. A, at 63-64.

Sergeant Moroney told the plaintiff that Officer Moore was being punished. The plaintiff said "Being punished? Since when does the Police Department punish people by keeping them out in a dangerous area by themselves? She could get killed like that. That's somebody's mom, and not just that, it's somebody's daughter." To which Sergeant Moroney replied, "Well if you don't like it . . . you want to see how it's like to work with a nigger." Moroney then instructed the plaintiff to drive the police vehicle back and drop it off, which the plaintiff did. Sergeant Moroney then drove him back to the location where

Officer Moore was standing and Moroney told the plaintiff to stand there with Moore and not to move from that location. Def. Ex. A, at 63-64.

At a different time in the fall or winter of 1997, Sergeant Moroney made the comment that "[a female officer] better watch herself, because these niggers around here will kill her." The plaintiff told Sergeant Moroney not to use those words. Sergeant Moroney was referring to the neighborhood in which the female officer lived, in which there was significant drug activity. Def. Ex. A, at 67.

Also during the fall or winter of 1997, Sergeant Moroney stated, in the plaintiff's presence, "why are they hiring these niggers?" No one else was present when the comment was made. The plaintiff responded, "Sarge, you know how I am when you talk like that. I'm asking you to stop." Def. Ex. A, at 93-94.

2. The Plaintiff's Conduct at the Impoundment Lot

On October 27, 1997, the director of enforcement for the Philadelphia Parking Authority, Vincent Fenerty, Jr, wrote a letter to Inspector Joseph O'Connor, the commanding officer of the East Police Division. In the letter, Mr. Fenerty stated that the plaintiff and his wife had come to pick up their car from the

impoundment lot on October 13 and that the plaintiff got into a verbal altercation with Deputy Manager Clarice Nicholson and Supervisor Redman of the parking authority. The plaintiff stated that he would "have [Ms. Redman's] job in the morning." Mr. Fenerty requested that Inspector O'Connor speak with the plaintiff about his "agitated behavior." Def. Ex. M.

3. The Conduct of the Plaintiff's Co-workers

In late 1997, the plaintiff overheard five or six other officers in the 7-squad discussing how to get more overtime by having each officer say that they played a role in a drug arrest. All of the officers would then be required to go to court and would get paid for their court time. The plaintiff went immediately to Sergeant Moroney and told him about the officers' plans. Sergeant Moroney told the plaintiff that he would take care of it and then went to the squad room where the officers were who had been discussing the overtime plan. Shortly thereafter, the squad was informed at roll call that no more than two people were allowed to participate in a drug arrest. Def. Ex. A, at 102-04.

A few days after the plaintiff reported the overtime plan to Sergeant Moroney, the plaintiff saw graffiti on the walls of the bathroom in the 25th district that included the

plaintiff's name and words like rat, asshole, and snitch. The word rat was also written on the plaintiff's time sheets, accrual sheets, and court notices. The plaintiff reported the graffiti to Sergeant Moroney, who stated he would take care of it. A couple of days later the plaintiff cleaned the graffiti off the bathroom walls. Def. Ex. a, 97-100, 118-120.

There were also various times, after the graffiti appeared through the end of 1997, when the plaintiff would ask for relief and would not get it from other officers. The plaintiff told his supervisors that his coworkers were not providing appropriate relief. Def. Ex. A, 134- 135.

At times during this period the plaintiff did not receive a radio or had to share a radio with his partner. Radios were in short supply in the 25th district. The plaintiff was also required to walk a beat by himself "a few times - not really that many, but a few times" when his partner had a later court time, and he also had to work outside when it was raining, while other officers would be inside the 7-squad room. Def. Ex. A, 134-135, 141.

Around Christmas time 1997, everyone on the 7-squad pitched in to give Sergeant Moroney a gift. The other officers in the squad gave it to Sergeant Moroney while the plaintiff, his

brother, William McKenna, who was also on the 7-squad, and their respective partners were not there. The plaintiff went to Sergeant Moroney and told him that the plaintiff had contributed to the gift and that Sergeant Moroney had thanked everyone but the plaintiff. Def. Ex. A, at 137.

4. The Plaintiff's Conversations With His Supervisors

After the plaintiff cleaned the bathroom walls, the graffiti reappeared. The plaintiff approached Sergeant Moroney and told Sergeant Moroney that the plaintiff was going to speak to Lieutenant Bachmayer and Captain Colarulo about the bathroom graffiti. In late December of 1997, the plaintiff met with Lieutenant Bachmayer and told him about the graffiti, about the plan regarding the drug arrests and overtime, and that the plaintiff believed he was being called a rat and a snitch because he reported the overtime plan to Sergeant Moroney. Def. Ex. A, 105-111.

The plaintiff, after being asked whether he had other problems with Sergeant Moroney, also told Lieutenant Bachmayer about Sergeant Moroney's use of the word nigger in regard to Officers Safford and Moore. Lieutenant Bachmayer suggested that he and the plaintiff report this information to Captain Colarulo.

Def. Ex. A, 105-111.

A few days later, in December of 1997, the plaintiff and Lieutenant Bachmayer met with Captain Colarulo. The plaintiff told Captain Colarulo about the bathroom walls, about the plan for getting more overtime, that the plaintiff had reported the plan to Sergeant Moroney, and about Sergeant Moroney's use of the word nigger to refer to Officer Safford and Officer Moore. Def. Ex. A, at 111-115.

The plaintiff stated that his purpose for bringing all the incidents to Captain Colarulo's attention was "because the second time when the bathroom got like that. That means no one listened to what the Sergeant had to say. And now if you hire white T-shirt ranked officers and put their foot down ... maybe these walls won't look like that again. Maybe things would come to a stop." Def. Ex. A, at 111-115.

After he was made aware of the graffiti, Captain Colarulo told the plaintiff that he would take care of it. Captain Colarulo went to the bathroom and saw that there was a fair amount of graffiti written in the bathroom, not all of which related to the plaintiff. Captain Colarulo notified the 24th District maintenance department, the department in charge of the building's maintenance, that the walls needed to be painted.

Def. Ex. E, at 31-33.

Captain Colarulo also told the 25th District officers that if graffiti was placed on the walls again, it would be dealt with through departmental discipline or criminal charges. Colarulo also notified the police department's EEO unit of the plaintiff's complaints regarding the graffiti and gave the plaintiff a direct order to report the plan for obtaining extra overtime to the EAD. Def. Ex. E, at 31-33.

5. The Plaintiff's Altercation With Seeger and the Department's Follow-up

On February 13, 1998, the plaintiff's brother, William McKenna stated that he thought that Sergeant Moroney "should be shot." The next day, February 14, the plaintiff was pushed by Officer Seeger, another officer, and the plaintiff hurt his wrist. The plaintiff had never spoken to Officer Seeger about his complaints of race discrimination, and the plaintiff was not aware whether Officer Seeger knew about those complaints. Def Ex. A, at 146-47

The plaintiff filed a worker's compensation claim for his hand injury. When Captain Colarulo was informed that Seeger had pushed the plaintiff, Captain Colarulo notified his supervisor, the internal affairs division, and the East Detective

Division so that an investigation into the pushing would occur. Def. Ex. L, Vol II. at 72; Def Ex. A, at 146-47, 160; Def. Ex. E, at 23-24.

The plaintiff subsequently had a meeting with Captain Colarulo during which he told him everything that had happened on February 14. During this meeting, the plaintiff stated that he did not have a problem with Sergeant Moroney until the February 14 incident. Def. Ex. A, at 156.

After February 14, the plaintiff was assigned to a position in the 19th district where he would receive the same rate of pay as he received in the 25th district. Because of his wrist injury, the plaintiff never actually worked in the 19th district, but instead worked at various restricted duty positions. Def. Ex. A, at 213, 216, 222-224.

After being notified of the incident between Officer Seeger and the plaintiff by Captain Colarulo, the East Detectives Division began an investigation. The plaintiff does not know if the investigators knew of his racial discrimination complaints. Def. Ex. A, at 159-60.

The plaintiff also met with Lieutenant Cullen and Lieutenant Wilson of the Ethics Accountability Division (EAD) to discuss the incident between Officer Seeger and the plaintiff as well as the plaintiff's information about police corruption. The

plaintiff is unsure whether he made the initial contact with EAD or vice versa, but EAD had been made aware of the plaintiff's allegations of corruption by Captain Colarulo, who notified the Chief of Internal Affairs about the allegations. Def. Ex. A, at 231-32, 242-43; Def. Ex. I, at 28-29.

The plaintiff received notice about one of his meetings with EAD via the teletype system, which was used to inform the officers about court appearances. The teletype notice stated that the plaintiff was to report to "17th and Patterson." Although the defendant was unaware what was at 17th and Patterson when he first received the notice, he later learned that it was the location for EAD. At the time the notice was sent, it was the policy of EAD to provide notification to officers through the court notice teletype system. Def. Ex. A, at 242-43; Def. Ex. I, at 32-33; Def. Ex. J..

The plaintiff was also interviewed by Inspector O'Connor about the incident with Officer Seeger in the 25th District in July of 1998. During the interview, the plaintiff grabbed his chest and told the Inspector he was having palpitations. One of Inspector O'Connor's staff called rescue, and after they arrived, the plaintiff recovered and said he wanted to leave. Inspector O'Connor directed him to go to the hospital and relieved the plaintiff of his weapon. Inspector

O'Connor took the weapon because he did not feel that it was safe for the plaintiff to have the gun given his abnormal behavior and his emotional state. It is department policy to remove an officer's gun when an officer is transported by rescue to the hospital. Def. Ex. K, at 20, 29. Def. Ex. H, at 58-59.

6. The Plaintiff's Private Criminal Complaints

Police department policy prohibits officers from filing private criminal complaints against other officers because those matters are to be handled through police department criminal procedures. In June of 1998, the plaintiff filed a private criminal complaint against Seeger, Moroney and another officer who was present when Seeger pushed the plaintiff. Def. Ex. P. The District Attorney did not prosecute the private criminal complaints because all of the parties involved were police officers. Def. Ex. A, at 147, 227-228; Def. Ex. H, at 12-13.

Because of the departmental policy that prohibited officers from filing these types of complaints, the internal affairs division initiated an investigation of the plaintiff's filing of the complaint in June of 1998[3]. Lieutenant Hogan

[3]The plaintiff has no evidence that, despite this policy, any other officers were permitted to file private criminal complaints. Def. Ex. A, at 267.

handled the investigation, and on September 21, Hogan interviewed the plaintiff[4]. During this interview, Hogan asked the plaintiff several questions about Moroney, including whether the plaintiff knew what kind of vehicle Moroney drove and whether the plaintiff stole Moroney's vehicle. Def. Ex. H, at 12-13; Def. Ex. A, at 171, 207.

7. The Plaintiff's Employment Evaluation

On February 20, 1998, Sergeant Moroney gave the plaintiff his annual review. Def. Ex. N. The plaintiff received satisfactory marks in all areas except in the category of "relationship with people - ability to get along with others: effectiveness in dealing with the public, other employees, patients, or inmates," in which he received an unsatisfactory mark. Def. Ex. N.

8. The Plaintiff's Concerns About the Anti-graffiti Officers

The plaintiff made a complaint to Captain Gallagher, who was the captain of the recruitment unit where the plaintiff was assigned to restricted duty. The plaintiff told Gallagher

[4]The plaintiff has no evidence that Hogan knew about his complaints regarding racial discrimination. Def. Ex. A, at 171.

about an incident wherein the plaintiff came home and there were unmarked police cars parked in the park behind his house. The officers stopped some neighborhood children, including the plaintiff's son, and called them over to the unmarked car. The officers gave the plaintiff's son a dollar, and also asked the plaintiff's son if he knew who lived in the plaintiff's house. Def. Ex. A, 270-74.

The plaintiff and his wife contacted the 8th district and requested that a supervisor come out and give them the names of the officers who were at the park near the plaintiff's home. Nobody came out, but somebody in the 8th district told the plaintiff that there were anti-graffiti unit officers at that location. The plaintiff's wife then called Lieutenant Kerrigan, the supervisor of the anti-graffiti unit. When Kerrigan refused to give the plaintiff's wife the names of the officers involved, the plaintiff spoke with Kerrigan. When Kerrigan would not give the plaintiff the officer's names, the plaintiff spoke with Gallagher. Gallagher then got the names of the officers, relayed the information to the plaintiff, and the plaintiff's wife filed an internal affairs complaint about the graffiti officers. Def. Ex. A, 270-274.

9. The Plaintiff's Medical Leave and Discharge

The plaintiff requested and received Family Medical Leave. Def. Ex. 2. He was ultimately discharged in October 1999 from the police force. His discharge was upheld by the Civil Service Commission. Def. Ex. A, at 279-80; vol II, at 28.

B. Litigation

The plaintiff originally brought suit against the City of Philadelphia and the following officers of the Philadelphia Police Department, Sergeant Moroney, Lieutenant Bachmayer, Captain Colarulo, Lieutenant Cullen, Lieutenant Wilson, Lieutenant Hogan, and Inspector O'Connor in their individual and official capacities. The complaint included a 42 U.S.C. § 2000e (Title VII) retaliation claim against the City of Philadelphia, a § 1981 retaliation claim against both the City and the individual defendants for retaliation, and a § 1983 claim against the City and the individual defendants for violating his constitutional right to privacy.

The defendants have filed a motion for summary judgment as to all claims. The plaintiff has agreed that summary judgment should be entered as to Lieutenant Cullen, Lieutenant Wilson, Inspector O'Connor, and Lieutenant David Hogan. The plaintiff also concedes summary judgment on the § 1981 claims.

The claims remaining are the plaintiff's Title VII claim against the City of Philadelphia and § 1983 invasion of privacy claims against the City and against individual defendants Sergeant Moroney, Lieutenant Bachmayer, and Captain Colarulo.

II. Plaintiff's Title VII Retaliation Claim

The decision whether to grant or deny summary judgment in an employment discrimination action under Title VII is governed by the Supreme Court's burden shifting analysis in McDonnell-Douglass v. Green, 411 U.S. 792 (1973), clarified in Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000).

Under this analysis, the plaintiff must first make out a prima facie case of discrimination. Reeves, 530 U.S. at 142. If the plaintiff does so, the defendant must present a legitimate, non-discriminatory reason for the employment action at issue. Id. Because the ultimate burden must always rest with the plaintiff, the defendant is not required to show by a preponderance of the evidence that it was, in fact, motivated by this particular reason. Rather, the defendant must merely present a reason for the action, which, if believed, would be legitimate and non-discriminatory.

In order to survive summary judgment, the plaintiff must then present evidence which shows that the proffered

explanation is "unworthy of credence" or, alternatively, that the real motivation was more likely than not discriminatory. Id. at 143; Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

A. Prima Facie Case

To establish a prima facie case of illegal retaliation, a plaintiff must show that: "(1) he engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action." Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001); see also Abramson v. William Patterson Coll. of New Jersey, 260 F.3d 265, 286 (3d Cir. 2001).

1. Protected Activity

An employee's opposition to employment practices that are unlawful under Title VII is protected activity. 42 U.S.C. § 2000e-3(a). The Third Circuit has noted that protected activity can include formal charges of discrimination filed by an employee "as well as informal protests of discriminatory employment practices, including making complaints to management . . . and expressing support of co-workers who have filed formal charges." Abramson, 260 F.3d at 288 (quoting Sumner v. United States Postal

Serv., 899 F.2d 203, 209 (2d Cir. 1990) (internal citations omitted).

Opposing the conduct of the defendants cannot be protected activity if no reasonable person could have believed that the actions taken by the defendants about which the plaintiff complained violated Title VII. See Clark County Sch. Dist. v. Breeden, 523 U.S. 268, 271 (2001) (per curiam). In Clark County, the Supreme Court held that because no reasonable person could have believed that the underlying incident violated Title VII, the employee could not make out a retaliation claim based on internal complaints about the incident.

The conduct that the plaintiff contends was discriminatory was Moroney's use of racial epithets four times in a period of over four months[5]. The plaintiff's theory of discrimination appears to be that such language created a hostile work environment. Title VII does protect persons from hostile work environment discrimination. 42 U.S.C. 2000e.

In order to determine if there is a hostile work

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[5]The plaintiff has also contended that his opposition to the other officers' plan to get illegal overtime was also protected conduct. However the plaintiff has not alleged any set of facts that would show that the plan to get illegal overtime was in any way related to race or was otherwise discriminatory under Title VII. Thus, the plaintiff's opposition thereto was not protected conduct.

environment, a court must view the totality of the circumstances and determine if the conduct alleged was severe and pervasive enough that a reasonable person would find the work environment abusive or hostile. Oncale v. Sundowner Offshore Serv., Inc. 523 U.S. 75, 81 (1998). A hostile work environment is one that is so severe that it alters the conditions of the victim's employment. Harris v. Forklift Systems, 510 U.S. 17, 21 (1993).

The Supreme Court listed some factors to consider when determining if a work environment is sufficiently pervasive and severe to be hostile in Harris v. Forklift Systems. These include: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or abusive or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Id. at 22-23.

A threshold problem with the plaintiff's complaint is that he is white and no African-American employees heard the alleged racial slurs. In Childress v. City of Richmond, 134 F.3d 1205 (4th Cir. 1998), the Fourth Circuit upheld in its entirety a decision of the district court to dismiss the plaintiffs' claims, holding that white men could not bring a claim of hostile work environment discrimination based on comments made about black and female coworkers. Id. at 1207.

In Childress, white male police officers brought suit,

with female officers, alleging that their supervisor created a hostile environment by a variety of racial and sexual comments, some of which were made in the presence of female officers. The white male plaintiffs alleged hostile work environment claims, based upon the plaintiff's allegations that the racially and sexually charged work environment destroyed the teamwork that was a vital and indispensable condition of police work, and retaliation claims based on their opposition to the commentary. Childress v. City of Richmond, 907 F. Supp. 934, 938 (E.D. Va. 1995).

The Childress court upheld the dismissal of both claims. The court found that the white males could not bring a hostile work environment claim based on either race or sex. Id. The court explained that the white officers, in essence, were either trying to bring a claim based on the violation of the civil rights of others, or that they were discriminated against by being treated better than their black peers. Neither of these were found to be valid Title VII claims. Id. at 940.

The Court agrees with the analysis in Childress. Under the facts of this case, the plaintiff cannot be a victim of a hostile work environment. The plaintiff's claims are weaker than those in Childress because he has not alleged that his working environment was affected by repercussions of the racial epithets,

such as the breakdown in teamwork alleged in Childress.

Nor can the plaintiff succeed on a Title VII claim under the theory that the African-American officers were the victims of a hostile work environment. The plaintiff has not alleged that any African-American employees heard the comments, that he informed any African-American employees about the statements, or that they otherwise learned of them second hand. The job conditions of African-American employees could not be changed solely by racial epithets of which they were not aware.

2. Adverse Employment Actions

An adverse employment action is an action taken by an employer that is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).

It includes any "significant change in employment status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits." Weston v. Pennsylvania, 251 F.3d 420, 430-31 (3d Cir. 2001).

The plaintiff alleges that the following were adverse employment actions:

a) the assault by Officer Seeger, resulting in not only

physical harm but also the loss of overtime pay;

b) being called a "rat" and a "snitch;"

c) not getting relief while on patrol;

d) being made to walk his beat alone;

e) having difficulty procuring a radio;

f) being subjected to questioning about Moroney's stolen auto;

g) having his son approached by an anti-graffiti officer;

h) receiving a job evaluation which was lower than he felt it should be;

i) being relieved of his weapon;

j) not being told of a death threat against him.

k) the district attorney's failure to proceed on his private criminal complaints;

l) his one time posting on the corner with Officer Moore; and

m) his transfer to another district.

Some of these actions were undertaken by persons other than the plaintiff's supervisors, such as his coworkers or the district attorney. These include items a, b, c, g, and k. The plaintiff has made no allegation that his supervisors either caused or failed to prevent these actions. They are therefore not employment actions for which his supervisors may be liable. Nor would these be adverse employment actions if carried out by

supervisors, as they did not change the terms, conditions, or status of his employment.

Items d, e, f, h, i, j, l, and m were performed by supervisors or, in the case of the difficulty procuring radios, continued to occur after the supervisors were made aware of the problem. Of these, items e, f, i, and j, are not adverse employment actions because they did not change the terms, conditions, or status of his employment.

Nor were items d or l adverse employment actions. They did not significantly change the terms and status of the plaintiff's employment; he was being required to perform the required duties of his position, a foot patrol officer.

Item h, the plaintiff's job evaluation, is also not an adverse employment action. First, it is unclear that this evaluation was "adverse," as it gave the plaintiff satisfactory marks in all but one category and a satisfactory rating overall. Even if it were adverse, a poor evaluation alone is not an adverse employment action if no further action is taken on the basis of the evaluation.

The evaluation itself does not impact the employee's job responsibilities or conditions of employment. Spears v. Missouri Dep't of Corrections, 210 F.3d 850, 854 (8th Cir. 2000). Because there is no evidence or allegation that any further,

adverse action was taken against the plaintiff because of the evaluation, it is not an adverse employment action.

Item m, the plaintiff's transfer to another district, was also not an adverse employment action. The Third Circuit has held that transfers are adverse employment action only where the transfer resulted in a job-related change in the plaintiff's employment. E.g., Jones v. School Dist., 198 F.3d 403 (3d Cir. 1999)(no summary judgment where plaintiff transferred to a more difficult school and required to teach less desirable sciences rather than physics); Torre v. Casio, 4 F.3d 825 (3d Cir. 1994)(no summary judgment where plaintiff had been laterally transferred to a dead-end job that had effectively been eliminated before he began).

Unlike the transfers in Jones or in Torres, the plaintiff has not alleged that, because of the transfer, he was required to do less desirable work or to do a job that limited his chances for promotion. The plaintiff only alleges that the position was less desirable for him because it was further away from his home. However, In Dilenno v. Goodwill Indust., the Third Circuit specifically differentiated between an employee's ability to do a new job, which was job-related, and the desire to live in a certain city, which was not. 162 F.2d 235, 236 (3d Cir. 1998). Like the desire to live in a certain city, the

plaintiff's desire to work near his home is not job-related, particularly when the change in location did not affect his job duties in any other way. The plaintiff has not shown that there was an adverse employment action in this case.

Even if the plaintiff's transfer and employment evaluation were adverse employment actions, there is no evidence that either of these actions were caused by the plaintiff's opposition to discriminatory conduct.

B. Non-Retaliatory Reason and Pretext

The defendants have also articulated non-retaliatory and non-discriminatory reasons for these actions that the defendant has not shown to be a pretext.

The plaintiff's transfer to another district was for his own safety, after the plaintiff's brother threatened the squad's supervisor and the plaintiff had a physical altercation with Officer Seeger. Sergeant Moroney gave the plaintiff a "needs improvement in relationships with people" rating because of the fight with Officer Seeger and the written complaint from the parking authority about the plaintiff's conduct.

The plaintiff has not provided the Court with additional argument as to why the defendants' purported non-discriminatory reasons are pretextual. There is no other

evidence showing that the reasons the defendants acted were really discriminatory.

The plaintiff cannot show protected activity or causation as required to make out a prima facie case under Title VII. Even if the plaintiff established a prima facie case, he has not shown that the defendants' legitimate, non-discriminatory reasons were a pretext. The Court, therefore, grants summary judgment to the defendants on the Title VII claim.

III. Plaintiff's § 1983 Claim for Invasion of Privacy

The plaintiff has alleged that his privacy was violated because the EAD office sent him an interview notice via teletype, which was available to other officers, even though it promised a confidential process for resolving EAD claims.

The plaintiff has admitted that he cannot state an actionable claim against the officers involved in the teletyping, Lieutenant Cullen and Lieutenant Wilson. Because the plaintiff does not allege that any of the other individual defendants participated in or even knew about the teletyping, the plaintiff has no § 1983 claim against the individual defendants.

Nor can the plaintiff succeed with his § 1983 claim against the City. For a city or municipality to be liable under § 1983 under the respondeat superior doctrine, the plaintiff must

show that the behavior of the employees was pursuant to official government policy or custom. Monell v. Dept. of Social Services of New York, 436 U.S. 658 (1978). The defendant has presented no evidence or argument that the Monell standard can be met. Without any evidence of an official policy or custom, the plaintiff's claims fail against the City.

Even if the plaintiff could overcome these barriers to bringing his § 1983 claim, summary judgment would still be appropriate. The Third Circuit has held that a § 1983 action for invasion of privacy must be limited to those rights of privacy that are fundamental or implicit in the concept of ordered liberty. Doe v. SEPTA, 72 F.3d 1133, 1137 (3d Cir. 1995). The right to privacy includes the individual's interest in preventing the disclosure of highly personal information. Sterling v. Borough of Minorsville, 232 F.3d 190, 194 (3d Cir. 2000). Whether or not the disclosure of information violates this right depends in large part on how intimate and personal the information is. Id. at 195.

In this case, the information revealed, that the plaintiff was to go to 19th and Patterson, was not intimate or personal. Though the plaintiff would have preferred that this information be kept private, it is not the type of information so protected and so personal that one's constitutional rights are

violated if it is revealed.

An appropriate order follows.

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MICHAEL MCKENNA, Plaintiff	:	CIVIL ACTION
v.	:	NO. 98-5835
CITY OF PHILADELPHIA, SGT. JOHN MORONEY, LT. FRANK BACHMAYER, CAPT. WILLIAM COLARULO, LT CULLEN, LT. WILSON, INSPECTOR O'CONNOR, AND LT. DAVID HOGAN, Defendants	:	

ORDER

AND NOW, this 16th day of January, 2003, upon consideration of the defendants' Motion for Summary Judgment Against Michael McKenna (Docket No. 64), the plaintiff's opposition thereto, and all supplemental filings by the parties, and following oral argument on November 1, 2002, IT IS HEREBY ORDERED that the motion is GRANTED and JUDGMENT IS HEREBY ENTERED for the defendants and against the plaintiff for the reasons set forth in a memorandum of today's date.

BY THE COURT:

Mary A. McLaughlin

MARY A. MCLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MYRNA MOORE, et al., Plaintiff	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, et al. Defendants	:	NO. 99-CV-1163

MEMORANDUM AND ORDER

McLaughlin, J. January 16, 2003

William McKenna and Raymond Carnation, two former Philadelphia Police officers, allege that they suffered disparate treatment, were retaliated against, and were subjected to a hostile work environment by the Philadelphia Police Department and the individual defendants in this case because they protested the disparate treatment of African-American officers on their squad and because they associated with African-American officers. Mr. McKenna also alleged that his constitutional rights were violated when the internal affairs department notified him about a meeting he was to have with them via the teletype system, accessible to all other officers. Both plaintiffs also alleged unspecified violations of their substantive and procedural due process rights. The defendants have filed a motion for summary

judgment on all claims. The Court will grant the motion.

I. Background

A. Facts

William McKenna and Raymond Carnation are former Philadelphia police officers[1]. Mr. Carnation graduated from the police academy on May 25, 1990. He worked various assignments before he was assigned to work in the 25th District of the Philadelphia Police Department in April of 1991. Mr. McKenna graduated from the police academy, was initially assigned to the tactical response team, and was assigned to work in the 25th district in October of 1992. Carnation Dep., at 44, 52; McKenna Dep., at 44, 60[2].

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[1] In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

[2]Hereinafter, the following abbreviations will be used to refer to materials in the record. William McKenna's deposition, which is defendant's exhibit A of the Defendants' motion for summary judgment against William McKenna and exhibit I of the

In late June or early August of 1997, the plaintiffs were changed, pursuant to their request, from the 2-squad to the 7-squad. They both preferred the hours of the 7-squad. Carnation Dep., at 57-58; McKenna Dep., at 70-72.

The plaintiffs were partners on the 7-squad. Their duties were community policing and they were responsible for walking a foot beat in a specific area. Their responsibilities were to respond to alarms, disperse any crowds on problem corners, interact with the community, be available if those in the community had issues, and respond to police calls within walking distance. Their first assignment was at 9th and Hunting Park. Carnation Dep., at 60-61; McKenna Dep., at 78-79.

In September of 1997, the plaintiffs were asked to change beats to C and Wyoming (the "Feltonville beat"). They

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defendants' motion for summary judgment against Raymond Carnation, will be labeled "McKenna Dep." followed by the volume number (if other than volume 1) and page number. Raymond Carnation's deposition, which is defendant's exhibit A of the Defendants' motion for summary judgment against Raymond Carnation and exhibit Q of the defendants' motion for summary judgment against William McKenna, will be labeled "Carnation Dep." followed by the volume number (if other than volume 1) and page number. References to other depositions will include the deponant's name and the relevant page number. The Exhibits to Plaintiff's opposition to Defendants' Motions for Summary Judgment will be labeled "Pl. Ex." followed by the exhibit letter and page number. References to the transcript from the November 1, 2002 oral argument on this motion are indicated as "Tr.", followed by the transcript's page number.

agreed, and began working the new beat, which had a schedule of 7:00p.m. to 3:00a.m.. McKenna Dep., at 188-89; Carnation Dep., at 77-78.

While they were working the Feltonville beat, the community referred to Mr. Carnation as "dumb or dumber." Captain Colarulo, the commanding officer of the 25th District, also received complaints from the community that Mr. Carnation was not patrolling or servicing his beat appropriately. The plaintiffs were removed from the Feltonville beat sometime before February of 1998 by Captain Colarulo. Carnation Dep., at 83-84; Bachmeyer Dep., at 23-24.

In the police department the hierarchy is: rank and file line officers, corporals, sergeants, lieutenants, and captains, who are the commanding officers for the various districts. Captain Colarulo became the commanding officer for the 25th District on August 8, 1997. After he arrived in the 25th District, he changed the way the foot beat officers were utilized on the 7-squad. Colarulo Dep., at 9; Carnation Dep., at 74; Moroney Dep., at 37-38.

When Mr. McKenna and Mr. Carnation started working in the 7-squad, Sergeant Gleeson, who worked 10:00a.m. to 6:00p.m., would try to arrange the assignments for the 7-squad before he left for the day. The 7-squad had no sergeant supervising them

after Sergeant Gleeson left at 6:00p.m.. In October of 1997, Sergeant Moroney became the sergeant supervisor of the 7-squad. Colarulo Dep., at 11; McKenna Dep., at 78, 125.

As part of the changes Captain Colarulo made, barricades were set up throughout the lower part of the district, a high crime area, in order to cut down on drug sales. The barricades were first erected in December of 1997; By January of 1998, the barricades were in place twenty-four hours a day. Carnation Dep., at 74; Moroney Dep., at 37-38.

Footbeat officers were required to stand at the barricades and request identification from all the cars. If somebody wanted to go by who lived in the area, the officers had to move the barricade and let the car go by, then put the barricade back. An officer working at the barricade could take a bathroom break or take lunch, but he or she had to have someone else cover their area. If another officer was unavailable to cover, the barricade officer was to call the supervisor. Carnation Dep., at 74; Moroney Dep., at 37-39.

1. <u>The Plaintiffs' Relationships With the Squad</u>

The plaintiffs have various complaints about their relationships with their coworkers. Mr. McKenna and Mr. Carnation were not given relief for breaks or rides to their

beats by other officers. The other officers also did not speak to the plaintiffs and made fun of Mr. McKenna by posting a picture of a bald man with the name "Bill" written on it. At times there were no radios available for Mr. McKenna and Mr. Carnation when they worked the 7:00p.m. to 3:00a.m. shift[3]. On other occasions, when Mr. McKenna tried to transmit a message over the police radio, another officer would do something with his or her radio to prevent the transmission of Mr. McKenna's message. This treatment by the other officers began before Sergeant Moroney became the 7-squad supervisor. McKenna Dep., at 85-87, 97-98, 123-26, 150, 167-68, 177-79; Carnation Dep., at 70, 147, 154-56.

After their arrival at the 7-squad, the plaintiffs complained to the officers who were responsible for driving the vehicles that he and Mr. Carnation were not getting rides. Mr. McKenna then complained to Sergeant Jackson, Sergeant Polumbo, and Lieutenant Frank Krause that the other officers would not give the plaintiffs rides. McKenna Dep., at 92-93.

Mr. McKenna socialized with Officers Sean McGonnis, Carla Wilson, Bruce Smith, and Paul Gassman, who are all African-

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[3] After Mr. McKenna complained to his supervisors about the lack of radios, a policy was implemented under which the officers were no longer allowed to take radios home so that more radios would be available.

Americans. He socialized with them outside the 7-squad operations room, in the police district building, but never socialized with them outside of the building or after work. McKenna Dep., at 88, 92-93.

The other white officers did not speak or socialize with African-American officers. Almost immediately after the plaintiffs arrived at the 7-squad, Carla Wilson, an African-American officer, told Mr. McKenna that other officers were not speaking to her. McKenna Dep., at 175-76.

On October 11, 1997, while Mr. McKenna and Mr. Carnation were working, the driver and the passenger in a car began shooting at a vehicle that was next to Mr. Carnation and Mr. McKenna. Mr. McKenna and Mr. Carnation asked, via radio, for priority assistance from the whole district. The shooters were apprehended by other officers within a minute and a half. Five minutes after the shooting, an officer arrived at the plaintiffs' location to relieve them so that they could leave the location and go give a statement as to what had occurred. Carnation Dep., at 79-82; McKenna Dep., at 118-20.

Sergeant Moroney was assigned to be the full-time supervisor of the 7-squad by Captain Colarulo in an attempt to provide more supervision for the squad. After Sergeant Moroney became their supervisor, the plaintiffs' problems with their

coworkers continued.

Within a week or two of Sergeant Moroney's arrival, Mr. McKenna complained to Sergeant Moroney that the other officers were not giving them breaks or rides, and that the other officers were not speaking to them. The plaintiffs continued to complain to Sergeant Moroney, telling him at least ten times on various occasions that the other officers would not give them rides. The plaintiffs "constantly" told Sergeant Moroney that they were not getting breaks and that the other officers were not performing their assigned patrols or speaking to the plaintiffs. McKenna Dep., at 172-73; Colarulo Dep., at 11, 13-14.

Mr. McKenna also told Sergeant Moroney that other officers were preventing him from transmitting over the radio. At some point after Sergeant Moroney's arrival, the other officers began to make rat noises in front of Mr. McKenna and Mr. Carnation and call them "rat" and "snitch" over the radio. Each time a fellow officer used the word "rat" or "snitch" to refer to one of the plaintiffs, the plaintiffs notified Sergeant Moroney. Subsequently, Sergeant Moroney notified the entire squad that disciplinary action would be taken if there was any more interference with the police radio. McKenna Dep., at 167-68, 177-79.

In November of 1998, the plaintiffs slipped a note under Captain Colarulo's door, requesting to speak with him. When he received the note that evening, the Captain was unable to raise the plaintiffs over the police radio because they had left early but were still getting paid, taking advantage of what is known as "slide time." In his statement to the Ethics Accountability Department, Mr. Carnation explained that, after the plaintiffs put the note under Captain Colarulo's door, Mr. Carnation believed the other officers believed he and Mr. McKenna were complaining to the Captain about the other officers using "slide time." Carnation Dep., at 143-146; Def. Ex. L.

The plaintiffs' problems with their coworkers continued. In December of 1997 or January of 1998, there was graffiti written on the walls in the bathroom of the 25th District. The graffiti stated that Mr. Carnation and Mr. McKenna were "rats," "snitches," and "pussies" and that they "belong in a rat hole." The words "Rat #1" was written on Mr. McKenna's January 1998 timesheet. McKenna Dep., Vol 2. at 17-21; McKenna Dep., at 156, 203.

2. The Plaintiffs' Interactions With Sergeant Moroney

The plaintiffs had a number of other interactions with

Sergeant Moroney during the time that he was their supervisor. The plaintiffs do not state in their depositions the exact dates or time periods of all of these interactions.

Within a week or two of Sergeant Moroney's arrival, in addition to telling him about the problems they were having with the other officers, Mr. McKenna told Sergeant Moroney about "racial problems" in the squad. McKenna Dep., at 125, 172-73.

On another occasion, Mr. Carnation and Mr. McKenna met with Sergeant Moroney and told him that Carla Wilson claimed that nobody talked to the black officers and that was why the black officers usually sat outside the operations room while waiting for assignments[4]. Id.

In mid-November, Carla Wilson told Mr. McKenna that Sergeant Moroney was a racist and that Sergeant Moroney kept the white females in the basement while she had to work outside. McKenna Dep., at 175-76.

Subsequently, Mr. McKenna tried to "forewarn" Sergeant Moroney about Carla Wilson's comment about him being a racist. Carla Wilson had not asked Mr. McKenna to speak with Sergeant

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[4]Carla Wilson denies ever having this conversation, or any other conversation about race issues in the squad, with the plaintiffs. Wilson Dep., at 32-34. However, for the purposes of deciding this summary judgment motion, the Court assumes as true that the conversation occurred.

Moroney on her behalf. Sergeant Moroney and Mr. McKenna were alone in the roll call room during this conversation, during which Sergeant Moroney told Mr. McKenna: "tell that critter to do what she has to do." Having grown up in Northeast Philadelphia, Mr. McKenna believed that the word "critter" meant a black person. McKenna Dep., at 193-95.

On one occasion when Sergeant Moroney was signing Mr. McKenna's log, a black female officer's voice was audible over the police radio. Sergeant Moroney made the comment: "Why do they continue in hiring these niggers? They are stupid as sin." Mr. McKenna said: "I don't appreciate that. You're held at a higher standard than I am." McKenna Dep., at 156, 204.

In addition to their other complaints about their relationship with their fellow officers, the plaintiffs also told Sergeant Moroney that they were receiving negative treatment because they associated with black officers. McKenna Dep., at 125, 167-69, 172-73.

The plaintiffs have also identified occasions where they felt they were treated unfairly by Sergeant Moroney. For example, Sergeant Moroney would let some officers take their personal vehicles out on the beat, but would not let Mr. Carnation do so. Mr. McKenna's hat was taken by another squad member. When Mr. McKenna questioned the sergeant about it, he

responded "get that shit out of my face." McKenna Dep., at 154-56.

The plaintiffs disliked that Sergeant Moroney made them wear their hats on their beats and did not assign Mr. McKenna the use of a jeep as frequently as Mr. McKenna felt was appropriate. They also disliked that Sergeant Moroney would patrol the area and require the plaintiffs to be in their assigned location, even when no activity had been reported at that location. McKenna Dep., at 153-159.

3. Interactions Between the Plaintiffs and Other Supervising Officers

The day after the October 11 shooting incident, the plaintiffs complained to Lieutenant Bachmeyer that no one had provided back-up to them because they were associating with black officers. Mr. Carnation and Mr. McKenna later spoke with Captain Colarulo about the incident and told him the same thing. Mr. McKenna also told the captain that the black officers were complaining of unfair treatment. McKenna Dep., at 127-28, 136-40.

The Deputy Police Commissioner, Richard Zapelli, turned down a recommendation by Sergeant Gleeson that the plaintiffs be given a commendation in relation to the shooting.

The plaintiffs slipped the under Captain Colarulo's door in November requesting to speak with the Captain because they wanted to discuss the commendation. When he met with the plaintiffs pursuant to this request, Captain Colarulo told Mr. McKenna and Mr. Carnation that they could not see Sergeant Gleeson's memo recommending the commendation, and that Sergeant Gleeson's request for the commendation had been denied. They did not talk about anything other than the commendation during this meeting. McKenna Dep., at 136, 144-149.

In December of 1997, the plaintiffs, Sergeant Moroney, and Lieutenant Bachmeyer had a meeting, during which the plaintiffs told Lieutenant Bachmeyer that they were being retaliated against for speaking to Sergeant Moroney and trying to resolve the issues with the black officers. During the meeting, Mr. Carnation also said that he believed the black officers were being treated unfairly. Specifically, Mr. Carnation stated that breaks were not being allocated correctly, vehicles were being improperly assigned to white officers, black officers were not given rides, and the plaintiffs were receiving the same type of treatment as the black officers. Carnation Dep., at 124-25, 127-28.

At this meeting, the plaintiffs were also given a reprimand by Lieutenant Bachmeyer for writing up an incident

report for a confidential drug location. The plaintiffs had put a "DC number" on the report, which would have given the public access to information about the confidential location, in violation of police department directives. McKenna Dep.., at 159, McKenna Dep. Vol. 2, at 63-65.

4. Events Involving Plaintiff William McKenna From February 1998 On

On February 14, 1998, at 2:00 a.m., Mr. McKenna returned to the district after working his beat and stated that "Sergeant Moroney should be shot." The next day, Mr. McKenna reported for roll call but was told by a sergeant not to stand roll call and to go work in the operations room instead. The sergeant also took Mr. McKenna's service weapon. McKenna Dep., Vol 2, at 72-73.

Mr. McKenna was served with 7518s, police disciplinary papers, for the statement about Sergeant Moroney. A police board of inquiry (PBI) hearing was held and Mr. McKenna was found guilty. He received a thirty-day suspension as a result. Mr. McKenna appealed the suspension to the Philadelphia Civil Service Commission, which upheld the suspension after a hearing. McKenna Dep., at 75-76.

On February 17, 1998, Captain Colarulo told Mr. McKenna

that he was being transferred and to report to the 12th district. Mr. McKenna then requested sick leave or vacation from Captain Lippo, the commanding officer of the 12th district, and was placed on sick leave. On March 5, 1998, Mr. McKenna reported back to work at a restricted duty position at the Philadelphia Police academy. McKenna Dep., Vol 2, at 81-82.

On February 20, 1998, Mr. McKenna received a performance evaluation. The evaluation contained an unsatisfactory rating in the category of "relationship with others, effectiveness in dealing with the public, other employees" and a satisfactory rating in all other areas. McKenna Dep., Vol 2 at 53.

In June of 1998, Lieutenant Cullen and Lieutenant Wilson of the Ethics Accountability Division (EAD) interviewed Mr. McKenna as part of the EAD investigation into allegations of police misconduct that Mr. McKenna's brother, Michael McKenna, had made. Mr. McKenna had already informed other officers that he was giving statements to EAD. A notice for this meeting was sent to Mr. McKenna and stated that he was to appear at "17 and Passyunk." This notice was sent via the police department's internal teletype system, which is used to inform officers of other appointments, such as court appearances. McKenna Dep., Vol. 2, at 45, 48-49; Cullen Dep., at 31-32.

In November of 1998, Mr. McKenna was placed on medical leave. At the time, he had been on restricted duty status for seven months and was still working a restricted duty position at the Philadelphia Police Academy. He had also served the thirty day suspension that was given at the PBI hearing. McKenna Dep., Vol 2, at 33.

When Mr. McKenna was placed on medical leave, the Police Department's policy was to permit only six months of restricted duty. Because Mr. McKenna's doctor stated that he was unable to return to regular duty he was put on sick leave when his restricted duty period expired. McKenna Dep., Vol. 2., at 93; Johnson Dep., at 13-14.

According to police department Directive 66, when a supervisor comes to the home of an officer who is out sick, the officer is required to present himself and sign a form, called a "75-48." This is called a "sick check." In late 1998 and early 1999, while Mr. McKenna was on sick leave, he did not respond to his door or sign the 75-48s during several sick checks. Mr. McKenna's wife put dog feces on his front step, which hindered the supervisor's attempts to perform the sick checks. McKenna Dep., Vol. 2, at 100-101.

Mr. McKenna was dismissed from the department because he failed five sick checks. He filed a grievance with his union

concerning the discharge, which resulted in an arbitration hearing. At the end of the two-day hearing, the arbitrator found in favor of the city and upheld the dismissal[5]. McKenna Dep., Vol. 2, at 119-20.

5. Events Involving Plaintiff Raymond Carnation From February 1998 On

On February 5, 1998, Mr. Carnation was working outside in the cold, rain, and ice. Nobody else from the police force was in the area and there were no police jeeps around. Mr. Carnation asked for relief and nobody showed up. Mr. Carnation then walked away from his post to get something to drink and eat. While he was walking, Sergeant Moroney contacted Mr. Carnation on the radio and asked what his location was. Mr. Carnation responded, and when Sergeant Moroney asked what he was doing, Mr. Carnation stated he was going to get something to eat and drink and warm up. Sergeant Moroney told Mr. Carnation to get back to his post and not leave until he got relief. Carnation Dep., at 199.

Mr. Carnation told Sergeant Moroney that nobody in the squad liked Mr. Carnation anymore and he couldn't get any relief.

[5]Pursuant to an October 25, 2001 order by this Court, Mr. McKenna's dismissal is not a part of this lawsuit.

Sergeant Moroney told him to go back to his post. Mr. Carnation returned to his post and stood there for another hour, then told Sergeant Moroney that he could not handle "this" anymore and went home. Carnation Dep., at 200.

Captain Colarulo, Lieutenant Bachmeyer, Sergeant Moroney, and Mr. Carnation had a meeting on February 6, 1998. Captain Colarulo told Mr. Carnation to apologize to Sergeant Moroney. Mr. Carnation told the Captain to talk to Officer Bruce Smith, an African-American officer, about the squad's racial problems. Mr. Carnation asked Captain Colarulo to tell "them" to stop going over police radio, writing stuff on the bathroom walls. Carnation Dep., at 204, 208.

Mr. Carnation then asked for a transfer. Captain Colarulo said: "I'm not transferring you. I'll transfer you to the farthest district when I feel I want to." Captain Colarulo told Mr. Carnation that he had to stay on his beat. Mr. Carnation responded that the day before there had been nobody out there, it had been freezing cold, and there had been rats. Captain Colarulo told Mr. Carnation that if he apologized to Sergeant Moroney, there would be no disciplinary action taken against him; Mr. Carnation apologized. Carnation Dep., at 210.

In May, in order to be able to go on restricted duty, Mr. Carnation presented a letter from Dr. Paul Dikon of Tyson

Associates Counseling Services. The letter stated that, effective May 12, 1998, Mr. Carnation was seeking limited duty because of personal problems. Carnation Dep., at 236-37.

On Friday of Memorial Day weekend, 1998, Mr. Carnation called Sergeant Moroney at the district to discuss the recent problems between them, but Sergeant Moroney did not get on the phone. Mr. Carnation called back but still was unable to speak to Sergeant Moroney. Captain Colarulo then called Mr. Carnation from the shore and told Mr. Carnation not to call Sergeant Moroney again. The next day, Mr. Carnation called Sergeant Moroney three or four times. He spoke with Sergeant Moroney during his last call. After Mr. Carnation spoke with Sergeant Moroney, Mr. Carnation got the number of Captain Colarulo's shore house from his caller ID and called Captain Colarulo at his shore house early that morning. Carnation Dep., at 252-60, 282.

In August of 1998, Mr. Carnation was served with 7518s for calling Captain Colarulo at his shore house without permission and calling Sergeant Moroney after being instructed not to. He was charged with insubordination, neglect of duty, and conduct unbecoming an officer. After he received the 7518s, Mr. Carnation made copies of them and posted them on the walls of the 25th district, the 8th district, and the Fraternal Order of Police lodge. Carnation Dep., at 282, 287-290.

In September of 1998, while Mr. Carnation was on sick leave, he went in to the District to pick up his check. At that time, Sergeant Hewitt stated: "we're not afraid of you and your nigger friends." A 25th District captain, Captain Lewis, investigated Mr. Carnations's complaint about this statement, but the complaint was not sustained. Carnation Dep., at 313, 327-39.

In February of 1999, there was a police board of inquiry (PBI) hearing held as a result of the charges issued in the 7518s. The PBI recommended termination. Mr. Carnation was dismissed from the police department pursuant to this recommendation, effective March 12, 1999. Carnation Dep., at 243, 295.

B. Litigation

Mr. McKenna and Mr. Carnation brought this suit, along with African-American officers Myrna Moore, Sheila Young, and Richard Safford, against the City of Philadelphia and the following officers of the Philadelphia Police Department, Sergeant Moroney, Lieutenant Bachmeyer, Captain Colarulo, Lieutenant Cullen, Lieutenant Wilson, Lieutenant Hogan, Sergeants Mack, Hewitt, and Jackson, and Inspector O'Connor in their individual and official capacities. The complaint included a 42 U.S.C. § 2000e (Title VII) retaliation claim against the City of

Philadelphia, a § 1981 retaliation and discrimination claim against both the City and the individual defendants for retaliation, and a § 1983 claim against the City and the individual defendants for violations of procedural and substantive due process. The African-American plaintiffs settled their lawsuit.

The defendants have filed a motion for summary judgment as to all of the plaintiffs' claims. The plaintiffs concede that summary judgment is appropriate on the § 1981 claims. Plaintiff William McKenna has agreed to the entry of summary judgement as to Lieutenant Cullen, Inspector O'Connor, and Sergeants Mack, Hewitt, and Jackson.

The claims remaining are the plaintiffs' Title VII claims against the City of Philadelphia, Mr. McKenna's § 1983 claim against the City and Sergeant Moroney, Lieutenant Bachmayer, Captain Colarulo, Lieutenant Wilson, and Lieutenant Hogan, and Mr. Carnation's § 1983 claim against the City and all individual defendants.

II. Plaintiffs' Title VII Retaliation Claim

The decision whether to grant or deny summary judgment in an employment discrimination action under Title VII is governed by the Supreme Court's burden shifting analysis in

McDonnell-Douglass v. Green, 411 U.S. 792 (1973), clarified in Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000).

Under this analysis, the plaintiff must first make out a prima facie case of discrimination. Reeves, 530 U.S. at 142. If the plaintiff does so, the defendant must present a legitimate, non-discriminatory reason for the employment action at issue. Id. Because the ultimate burden must always rest with the plaintiff, the defendant is not required to show by a preponderance of the evidence that it was, in fact, motivated by this particular reason. Rather, the defendant must merely present a reason for the action, which, if believed, would be legitimate and non-discriminatory.

In order to survive summary judgment, the plaintiff must then present evidence which shows that the proffered explanation is "unworthy of credence" or, alternatively, that the real motivation was more likely than not discriminatory. Id. at 143; Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

A. Prima Facie Case

To establish a prima facie case of illegal retaliation, a plaintiff must show that: "(1) he engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and

(3) a causal link exists between the protected activity and the adverse action." Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001); see also Abramson v. William Patterson Coll. of New Jersey, 260 F.3d 265, 286 (3d Cir. 2001).

1. Protected Activity

An employee's opposition to employment practices that are unlawful under Title VII is protected activity. 42 U.S.C. § 2000e-3(a). The Third Circuit has noted that protected activity can include formal charges of discrimination filed by an employee "as well as informal protests of discriminatory employment practices, including making complaints to management . . . and expressing support of co-workers who have filed formal charges." Abramson, 260 F.3d at 288 (quoting Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990)) (internal citations omitted).

Title VII protects persons from being victims of discrimination because of their race. Protected activity does not exist if no reasonable person could have believed that the actions taken by a defendant violated Title VII. See Clark County Sch. Dist. v. Breeden, 523 U.S. 268, 271 (2001) (per curiam). In Clark County, the Supreme Court held that because no reasonable person could have believed that the underlying

incident violated Title VII, the employee could not make out a retaliation claim based on internal complaints about the incident. Id.

The plaintiffs' primary complaint about the defendants' conduct was that Sergeant Moroney and other co-workers were treating the plaintiffs unfairly. The plaintiffs complained that they were not getting rides, breaks, or back-up, that the other officers teased them and called them names, and that Sergeant Moroney kept a close watch on their behavior and would not let them do things like take their personal cars on the beat or work without their hats on. The plaintiffs also made complaints to their supervisors that white officers would not associate with or speak with black officers, that Sergeant Moroney used racial slurs, and that white officers were getting preferential treatment in the allocation of assignments and police vehicles.

This conduct, if it constituted discrimination, would most likely fall into the category of either hostile work environment discrimination or disparate treatment discrimination.

a. The Plaintiffs' Complaints About Hostile Work Environment Discrimination Against Them

There is a hostile work environment if, considering the totality of the circumstances, the conduct alleged was severe and

pervasive enough that a reasonable person would find the work environment racially abusive or hostile. Oncale v. Sundowner Offshore Serv., Inc. 523 U.S. 75, 81 (1998).

The name calling, lack of breaks, rides, and relief, and Sergeant Moroney's close watch over the plaintiffs did not create a racially hostile work environment because the conduct was not in any way related to race. Mr. McKenna and Mr. Carnation, white males, have provided no evidence that this conduct by their fellow officers or by Sergeant Moroney was motivated by racial animus or was in any other way race-related. A reasonable person could not find that this conduct was a violation of Title VII, which requires a racial component.

Nor could a reasonable person believe that the use of racial epithets created a hostile work environment for the plaintiffs in this case. The threshold problem with the plaintiffs' claim is that they are white. The use of racial slurs against African-Americans is insufficient to create a hostile work environment for a white plaintiff. See, e.g., Childress v. City of Richmond, 134 F.3d 1205 (4th Cir. 1998)(holding that white male plaintiffs could not bring a hostile work environment claim based on inappropriate racial slurs made against African-American co-workers).

b. The Plaintiffs' Complaints of Disparate Treatment Discrimination Against Them

Disparate treatment discrimination occurs under Title VII where 1) the victim is a member of a protected class, 2) the victim was qualified for the position he or she sought, 3) he or she suffered an adverse job action; and 4) non-members of the protected class were treated differently. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See also Goosby v. Johnson & Johnson, 228 F.3d 313, 318-19 (3d Cir. 2000).

The threshold problem with the plaintiffs' claim of disparate impact discrimination is, again, that they are white. The plaintiffs claim that they were victims of disparate treatment discrimination based on their perceived association with African-American officers.

Although some courts have held that a white person may bring a Title VII disparate treatment claim based on his or her association with a member of another race, they have done so only where the ties to the minority racial group were much stronger than those the plaintiffs allege.

In Dici v. Commonwealth of Pennsylvania State Police, 91 F.3d 542 (3d Cir. 1996), the Third Circuit, in dicta, assumed that the plaintiff had a valid discrimination claim based on her well known romantic involvement with an African-American

supervisor. See also generally Rosenblattt v. Bivona & Cohen, 946 F. Supp. 298 (S.D. NY. 1998)(white male stated a claim under Title VII due to his marriage to a black woman); Parr v. Woodmen of the World Life Ins. Co, 791 F.2d 888 (M.D. Ga. 1986)(same); Reiter v. Center Consol. Sch. Dist., 618 F. Supp. 1458 (D. Colo. 1985)(white female stated a claim under Title VII due to her "close" association with Hispanic residents of the district); Gresham v. Waffle House, Inc, 586 F. Supp. 1442 (N.D. Ga. 1984)(white female stated a claim under Title VII when she was discharged because of her marriage to a black man); Whitney v. Greater New York Corp. of Seventh Day Adventists, 401 F. Supp. 1363 (S.D. NY. 1975)(white female stated a claim under Title VII because of her social friendship with a black male).

Unlike the white plaintiffs in these cases, the plaintiffs in the instant case have alleged no close relationships or even friendships with the African-American officers. There is no evidence in the record that would indicate that either plaintiff ever socialized with African-American officers outside of work, or at any time during work other than a few minutes before roll call. Because their association with the African-American officers was too minimal to place the plaintiffs in a protected class, no reasonable person could believe that the plaintiffs were victims of disparate impact discrimination.

c. The Plaintiffs' Complaints About the Treatment of African-American Officers

The plaintiffs also allege that they complained about the treatment of African-American officers. They allege that they made complaints that Sergeant Moroney was using racial epithets, that white officers were not associating with black officers or giving them rides or relief, that the African-American officers were getting different assignments than they had previously received before Sergeant Moroney arrived, and that vehicles were being assigned unfairly.

In order to survive a motion for summary judgment, the plaintiffs have the burden of alleging specific facts to show that the conduct they complained about was discriminatory. The plaintiffs have not done so, leaving the Court with insufficient evidence to determine whether a reasonable person would believe that the conduct the plaintiffs complained about was discriminatory under Title VII.

The plaintiffs cannot succeed on a Title VII claim under the theory that the African-American officers were the victims of a hostile work environment based on Sergeant Moroney's racial slurs. The plaintiffs have not alleged that any African-American employees heard the comments or that they otherwise learned of them second hand. The job conditions of African-

American employees could not be changed solely by racial epithets of which they were not aware.

The plaintiffs also have not met their burden of alleging facts that would show that a reasonable person would believe that other conduct about which the plaintiffs complained was discriminatory under Title VII. The plaintiffs have alleged that Sergeant Moroney and the other officers engaged in conduct that was discriminatory, but have not alleged facts that would show that any of the conduct towards the African-American employees was so severe and pervasive as to create a hostile working environment, or that it resulted in adverse employment actions that would create disparate treatment discrimination.

2. Adverse Employment Actions

In order to present a prima facie case of retaliation, the plaintiffs must allege facts that would show that adverse employment actions that were taken against them[6]. An adverse employment action is an action taken by an employer that is "serious and tangible enough to alter an employee's compensation,

[6]Adverse employment actions must also be alleged in order to present a claim of disparate treatment. The plaintiffs are not members of a protected class, and have no viable claim for disparate treatment discrimination. If they had proved they were in a protected class, however, this adverse employment action analysis would apply to their disparate treatment claims as well.

terms, conditions, or privileges of employment." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). It includes any "significant change in employment status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits." Weston v. Pennsylvania, 251 F.3d 420, 430-31 (3d Cir. 2001).

The plaintiffs allege that the following were adverse employment actions[7]:

a) they were separated as partners;

b) Mr. Carnation was required to perform duties without a partner;

c) they were required to continue patrols without proper backup;

d) they were removed from the C & Wyoming detail;

e) Mr. McKenna received an unfavorable job appraisal[8];

f) Mr. McKenna was sick checked excessively;

g) an internal IAD investigation resulted in a finding that Mr. Carnation had engaged in policy-violating conduct;

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[7]At oral argument, the plaintiffs also alleged that being subjected to a hostile work environment was an adverse employment action. Because the plaintiffs were not victims of a hostile work environment, the Court will not address this issue further.

[8]The plaintiffs have not provided a copy of the evaluation or identified any other evidence in the record that would support the assertion in their brief and at oral argument that Mr. Carnation received an unsatisfactory evaluation.

h) the other officers would not give them rides or relief and called them names; and

i) Sergeant Moroney checked up on them frequently[9].

The plaintiffs have not shown facts to indicate that the conduct of their fellow officers, action h, was caused, allowed, or encouraged by their supervisors. Even if Sergeant Moroney had permitted or caused the other officers to engage in this conduct directed at the plaintiffs, the actions would not rise to the level of adverse employment actions.

Neither the actions of the other officers, nor actions b, c, f, g, and i, changed in any significant way the duties, responsibilities, compensation, benefits, or job conditions of the plaintiffs' jobs as footbeat officers.

The less than favorable job appraisal was also not an adverse employment action. A poor evaluation alone is not an adverse employment action if no further action is taken on the basis of the evaluation; the evaluation itself does not impact the employee's job responsibilities or conditions of employment. Spears v. Missouri Dep't of Corrections, 210 F.3d 850, 854 (8th Cir. 2000). There is no evidence that any further action was

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[9]The plaintiffs have also alleged in their brief that Sergeant Moroney did not approve their requests for days off or vacation, but have provided no citation to this fact in the record.

taken against Mr. McKenna because of the evaluation. It was not an adverse employment action.

The plaintiffs' transfer from the C & Wyoming detail and their separation as partners were also not adverse employment actions. The Third Circuit has held that a transfer is an adverse employment action only where the transfer resulted in a job-related change in the plaintiff's employment. E.g., Jones v. Sch. Dist.,198 F.3d 403 (3d Cir. 1999)(no summary judgment where plaintiff transferred to a more difficult school and required to teach less desirable sciences rather than physics); Torre v. Casio, 4 F.3d 825 (3d Cir. 1994)(no summary judgment where plaintiff had been laterally transferred to a dead-end job that had effectively been eliminated before he began).

Unlike the transfers in Jones or in Torres, the plaintiffs have not alleged that they were required to do less desirable work or to do a job that limited their chances for promotion because of the transfer from C & Wyoming.

Nor have the plaintiffs alleged facts that would show that their separation as partners made their jobs any less desirable, lucrative, or otherwise significantly changed the terms or conditions of their employment.

3. Causal Connection

Even if they could make a showing of protected conduct and adverse employment action, the plaintiffs would also have to show that there was a causal connection between the two.

In this case, the record is unclear as to the exact timing and sequence of events. It is impossible to determine on the basis of the record presented whether most of the alleged adverse employment actions followed the alleged protected conduct or whether the two were close enough in time to show causation.

Even assuming that the two were close in time, however, many of the problems that the plaintiffs allege to be adverse employment actions began occurring before the plaintiffs ever made any complaints about perceived racial discrimination. The plaintiffs have provided no evidence that their fellow officers knew of their racial complaints.

B. Non-Retaliatory Reason and Pretext

Even if the plaintiffs had met their burden of alleging a prima facie case, summary judgment would still be appropriate because the defendants have provided non-retaliatory, non-discriminatory reasons for all of the alleged adverse employment actions that the plaintiffs have not shown to be pretextual.

Once a plaintiff has presented a prima facie case for

retaliation, the burden shifts to the defendants to provide a legitimate, non-retaliatory reason for their action. Jones, 198 F.3d at 410. If the defendants can provide such a reason for their actions, the burden is on the plaintiff to show that the reason provided was merely a pretext. Id.

The defendants have presented non-discriminatory, non-retaliatory reasons for the alleged failure by the supervisors to control and prevent the malicious conduct of their fellow officers. The defendants explained that the conduct of the other officers could not have been controlled by supervisors until it was brought to their attention. After the problems were brought to the supervisors' attention, steps were taken to correct the problems between the plaintiffs and other officers.

The defendants have also provided non-discriminatory, non-retaliatory explanations for the supervisors' other conduct. The plaintiffs were removed from the C & Wyoming beat because the commanding officer of their district had received complaints from the community about the plaintiffs' job performance. They were separated as partners because Mr. McKenna was transferred out of the district after stating that his supervisor should be shot. Mr. Carnation was required to work his beat alone because his partner was unavailable and because it was a regular part of his job as a footbeat officer.

Mr. McKenna received an unsatisfactory rating in his evaluation with respect to getting along with others because he stated that his supervisor should be shot and because of his problems getting along with other squad members. The various interviews and investigations of the plaintiffs were undertaken by the department because of Mr. McKenna's statement about Sergeant Moroney being shot, and because of Mr. McKenna's brother, Michael McKenna's, allegations of police corruption. Mr. McKenna was repeatedly sick checked because he kept failing sick checks.

All the other alleged adverse employment actions either were attempts to ensure that the plaintiffs were performing the duties required of them as footbeat officers and/or were actions undertaken according to longstanding, nondiscriminatory departmental policy directives. The plaintiffs have not shown that any of these reasons were pretextual. The Court grants summary judgment on the retaliation claim.

III. Hostile Work Environment and Disparate Treatment Claims

In their opposition to the motion for summary judgment, the plaintiffs raised, for the first time, claims that they were subjected to hostile work environment discrimination and disparate treatment discrimination. Even if the plaintiffs could

raise new claims at this stage in the proceedings, the plaintiffs have not sufficiently alleged facts to support these claims, as already explained.

IV. Mr. McKenna's § 1983 Claim for Invasion of Privacy

Mr. McKenna has alleged that his privacy was violated because the EAD office sent him an interview notice via teletype, which was available to other officers, even though it promised a confidential process for resolving EAD claims.

The Third Circuit has held that a § 1983 action for invasion of privacy must be limited to those rights of privacy that are fundamental or implicit in the concept of ordered liberty. Doe v. SEPTA, 72 F.3d 1133, 1137 (3d Cir. 1995). The right to privacy includes the individual's interest in preventing the disclosure of highly personal information. Sterling v. Borough of Minorsville, 232 F.3d 190, 194 (3d Cir. 2000). Whether or not the disclosure of information violates this right depends in large part on how intimate and personal the information is. Id. at 195.

In this case, the information revealed, that Mr. McKenna was to go to 19th and Patterson, was not intimate or personal. Though Mr. McKenna would have preferred that this information be kept private, it is not the type of information so

protected and so personal that one's constitutional rights are violated if it is revealed[10].

In addition, Mr. McKenna's claim against the City is also barred by Monell. For a city or municipality to be liable under § 1983 under the respondeat superior doctrine, the plaintiff must show that the behavior of the employees was pursuant to official government policy or custom. Monell v. Dept. of Social Services of New York, 436 U.S. 658 (1978). Mr. McKenna has argued that the standard has been met but has presented no evidence that this is the case. Without any evidence of an official policy or custom, the Mr. McKenna's claims fail against the City. The Court accordingly grants summary judgment to the defendants on this claim.

V. The plaintiffs' § 1983 Due Process Claims

In the amended complaint, the plaintiffs made unspecified claims under § 1983 for violations of their substantive and procedural due process rights. The plaintiffs did not brief this issue further in their opposition to the motion for summary judgment, and mentioned it only briefly at

[10]This is further supported by the McKenna's own admission that he had already told his fellow officers that he was giving statements to EAD.

oral argument.

The plaintiffs have not presented any legal theory or pointed to any specific facts which would support a claim that their substantive or procedural due process rights were violated. I will grant summary judgment on these claims.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MYRNA MOORE, et al., Plaintiff	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, et al., Defendants	:	NO. 99-CV-1163

ORDER

AND NOW, this 16th day of January, 2003, upon consideration of the defendants' Motion for Summary Judgment Against William McKenna (Docket No. 75) and Motion for Summary Judgment Against Raymond Carnation (Docket No. 76), the plaintiffs' opposition to the motions, and all supplemental filings by the parties, and following oral argument on November 1, 2002, IT IS HEREBY ORDERED that the motions are GRANTED and JUDGMENT IS HEREBY ENTERED for the defendants and against the plaintiffs for the reasons set forth in a memorandum of today's date.

BY THE COURT:

Mary A. McLaughlin

MARY A. MCLAUGHLIN, J.